No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. PHILLIPS,

Appellant,

vs.

MANUFACTURERS TRUST COMPANY, a Corporation, and ALEXANDER LEWIS,

Appellees.

REPLY BRIEF OF APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

SERENES T. SCHREIBER and
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JESS HAWLEY,
OSCAR W. WORTHWINE,
Attorneys for Appellees,
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.....Clerk.

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Counsel for defendant in his brief, in order to avoid the rule of law anounced in 82 Fed. (2 ed.) 375 (supra), has taken the position that under the state statute no new summons could issue. Therefore, it would be of no value to the plaintiff to have the case remanded.

Our answer to this contention is:

First. Whether or not a new summons could be issued is a matter solely for the consideration of the State court and not for the Federal court.

Second. When the Federal court entered its order quashing the service of summons and complaint its juris-

diction over the case ended, and when it went further (if at the request of the defendant) and proceeded to pass upon the question of whether or not under the State law a new summons could issue out of the State court, this under the authorities in our original brief and under all other authorities constituted a general appearance of the defendant and the case should not have been dismissed but remanded. In defendant's motion to quash service of summons it did not ask the court to pass upon the question as to whether or not a new summons could issue out of the State court, but defendant has now raised that question in its brief filed in this court. This we contend constitutes a general appearance in the action and is a waiver of the motion to quash service of summons.

Third. There is no limitation of the time service of summons should be made and the State court may permit the original summons to be withdrawn for the purpose of making a new service thereof.

Shaw vs. Martin, 20 Idaho 175.

Fourth. If the defendant's construction of the statute be correct, then in all cases where the first summons was issued on the last day of the year then no subsequent summons could ever be issued in the case. This is not a reasonable construction of the statute. The original service of summons in this case in the State court was quashed by order of the Federal Court May 5, 1938 (Tr. p. 130). We contend that the plaintiff had one year after the original summons had been quashed within which time to have a new summons issued which would be up to May 5, 1939.

The statutory time for issuing a new summons surely did not run while the original summons and the service thereof were under attack by the defendant.

In Laubenheimer vs. Factor, 61 Fed. (2 ed.) p. 630, the court says: "It is too well settled for discussion that Federal Courts take judicial notice of the public laws of all the states and of course of the particular state wherein the court is sitting."

Straton vs. New, 283 U.S. 318, 328,
75 L. Ed. 1060.

U.P.R. Co. vs. Wyler, 158 U.S. 285, 296,
39 L. Ed. 983.

Gormley vs. Bunyan, 138 U.S. 623, 635,
34 L. Ed. 1086.

This applies as well to authoritative decisions of the highest state tribunal declaring the law of the state.

Lamas vs. Micon, 114 U.S. 218, 223,
29 L. Ed. 94."

The State court has not passed upon the question of the sufficiency of the service of the first summons and complaint and if this case should be remanded the State court may hold the original service in said court to be a good and sufficient service.

The refusal of a Federal court to remand is reviewable on appeal from the final judgment of the Federal District Court.

Missouri Pacific Railroad Company vs. Fitzgerald,
160 United States 556, 40 Law Edition 536.

Taking into consideration the importance of this case

and the amount involved the court should not have dismissed the action but remanded the same to the State court, thereby permitting the plaintiff to have an opportunity to establish his cause of action.

Respectfully submitted,

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